Midwest Environmental Advocates

March 1, 2017

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VIA ELECTRONIC MAIL to:
DNRAdministrativeRulesComments@wisconsin.gov;
Jason.Knutson@wisconsin.gov

Re: Rule Package 5/WT-12-12/CR 17-002

Mr. Knutson:

Thank you for the public hearing and comment opportunity afforded for the above-referenced rule package (hereinafter also referred to as "Rule Package 5"). The issues resolved by the package are intertwined with the Petition for Corrective Action (PCA) that Midwest Environmental Advocates (MEA) filed in fall 2015 on behalf of 16 citizens who live throughout the State. As such, the following comments are submitted both by MEA and 16 citizen-Petitioners, as well as by the John Muir Chapter of the Sierra Club.

With the exception of several minor comments and questions addressed herein, MEA writes in overall support of rule package 5. We begin our letter with several general comments on the importance of this rule package as it relates to compliance with the Clean Water Act (CWA). This letter closes with more specific questions and comments regarding the antibacksliding (Issue 14) component of the package.

I. The referenced rule package brings the WPDES Program toward compliance with the CWA, particularly in light of Act 21 and its impact upon agency authority.

The following issues are, per the DNR's analysis, rule changes that were addressed by a January 19, 2012, statement from the Attorney General: New Source Performance Standards and other ELGs (Issue 7); and Definitions of "Point Source" and "Pollutant" (Issue 44). Signatories to this letter urge the DNR, to the extent necessary and not already completed, to utilize rulemaking updates to resolve all issues outlined in the 2012 Attorney General Statement.

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The Environmental Protection Agency (EPA) noted during its investigation in response to the PCA that legal decisions proceeding the 2012 Statement "rais[ed] concern"[1] regarding whether the Statement could resolve with legal enforceability ***any*** of the issues outlined in the 2011 legal deficiency letter from the EPA to the DNR.

Whether in communication with Petitioners or through broader communication, signatories to this letter request that the DNR provide the interested public with further clarification regarding whether the DNR intends to continue relying upon the 2012 Statement as resolving any of the "75 issues," particularly without any corresponding rulemaking updates.

Several issues addressed by Rule Package 5, such as antibacksliding (Issue 14), also indicate that existing rules give the DNR similar broad authority, but that proposed rule changes will afford the Department more explicit authority to comply with federal law. The DNR was put on notice as far back as the 2011 legal deficiency letter from the EPA that Act 21, and more significantly the DNR's expansive interpretation of the Act, will likely require the Department to rely upon incredibly explicit statutes and rules in order for the state to comport with the CWA.

Petitioners appreciate that the proposed updates will give the DNR such authority. All signatories to this letter will continue to follow rulemaking that purports to resolve the "75 issues" to ensure that language is specific enough to satisfy the EPA's review of Wisconsin's legal authority to administer the Wisconsin Pollutant Discharge Elimination System (WPDES) Program.

Petitioners and other signatories to this letter also appreciate that the majority of Rule Package 5 adds language to Wisconsin Administrative Code that is identical or nearly identical to language in the CWA. In light of the constraints on Wisconsin state courts to preside over cases that challenge a permit's compliance with federal law, all citizens impacted by WPDES-permitted facilities statewide should be able to rely upon state laws that comport on their face with federal law.

II. The proposed rule changes must clarify that the exception identified in Wis. Admin. Code NR § 207.12(3)(a)(3) does not apply to WQBELs.

Federal law generally requires that effluents limits or standards in a reissued, revoked and reissued, or modified permit shall be at least as stringent as the limits or standards in the previous permit.[2] The Clean Water Act sets out several exceptions to this general prohibition against relaxing limits and standards, which the proposed rules incorporate.[3]

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[1] EPA, Wisconsin Legal Authority Review Status 07.28.2016, https://www.epa.gov/sites/production/files/2016-07/documents/wi-lar-status-20160728.pdf (last visited Mar. 1, 2017).

[2] CWA at 33 U.S.C. § 1342(o); see also 40 C.F.R. § 122.44(l).

[3] *See id.*

The proposed NR 207.12 (3)(a)(3), however, applies one of the exceptions in a manner that is inconsistent with federal law. Under the Clean Water Act, the exception for "technical mistakes or mistaken interpretations of law" does not apply to water quality based effluent limits.[4] To make Wisconsin Administrative Code consistent with federal law, the proposed rules should make clear that the exception identified in NR 207.12 (3)(a)(3) does not apply to WQBELs, or water quality based effluent limits.

Thank you for your time and consideration of the preceding comments.

Regards,

Tressie Kamp and Jimmy Parra
Staff Attorneys
Midwest Environmental Advocates
On behalf of 16 citizen-Petitioners to the PCA

Bill Davis
Chapter Director
Sierra Club – John Muir Chapter

cc: Attorney Barbara Wester and Mr. John Colletti, U.S. EPA Region 5

[4] CWA Section 402(o)(2); *see also* U.S. EPA's NPDES Permit Writers Manual, p. 7-3 (stating "the exceptions for technical mistakes or mistaken interpretations and permit modification...would not apply to WQBELs.").